

1 Department of Labor and Industry  
2 Board of Personnel Appeals  
3 PO Box 201503  
4 Helena, MT 59620-1503  
5 (406) 444-0032  
6  
7

8 STATE OF MONTANA  
9 BEFORE THE BOARD OF PERSONNEL APPEALS

10  
11 IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 2-2017

12	TOD ZELLMER,	)	
13		)	
14	Complainant,	)	
15	-vs-	)	INVESTIGATIVE REPORT
16		)	AND
17	MONTANA PUBLIC EMPLOYEES	)	NOTICE OF INTENT TO DISMISS
18	ASSOCIATION,	)	
19	Defendant,	)	
20		)	

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23 **I. Introduction**  
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25 On September 20, 2016, Tod Zellmer, appearing pro se, filed an unfair labor practice  
26 charge with the Board of Personnel Appeals alleging that the Montana Public  
27 Employees Association, hereinafter MPEA or Association, violated sections 39-31-201  
28 and 39-31-402(b), MCA, by refusing to process a grievance to final and binding  
29 arbitration, a breach of the duty of fair representation.  
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32 MPEA was served with the complaint and James P. Molloy, attorney at law, responded  
33 on behalf of MPEA denying that the Association had committed an unfair labor practice.  
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35 John Andrew was assigned by the Board to investigate the charge and has  
36 communicated with the parties and exchanged information as necessary.  
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38 **II. Findings and Discussion**  
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40 The events giving rise to this complaint begin in the spring of 2016. At that time Mr.  
41 Zellmer was employed by Lewis and Clark County in the Public Works Department. He  
42 had approximately 14 years with the County. Mr. Zellmer worked in the Road and  
43 Bridge Shop and was subject to the collective bargaining agreement between MPEA  
44 and the County. Mr. Zellmer was based out of Lincoln, Montana. He resides on the  
45 east side of Stemple pass with his girlfriend, Diane Ironi.  
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47  
48 On or about March 16, 2016, Mr. Zellmer received word from Ms. Ironi that her vehicle  
49 had gone off the road. The incident occurred after Ms. Ironi's shift in Lincoln had  
50 concluded and she was headed home in the afternoon. There was a delay between the

1 time the incident occurred and when Ms. Ironi contacted Mr. Zellmer. When he became  
2 aware of the situation Mr. Zellmer proceeded east from the shop in Lincoln to the  
3 accident site, about 1.5 miles away. Mr. Zellmer then used a County loader to remove  
4 the car from the stream (Poor Man's Creek) where it had come to rest. The car was left  
5 on the side of the road at the accident scene. No one else was involved in the accident,  
6 and, according to Mr. Zellmer, Ms. Ironi had no serious injuries, so Mr. Zellmer took her  
7 home as she insisted he do so. He later returned and removed the car from the side of  
8 the road. Ms. Ironi did not report the accident to law enforcement. In the case of Mr.  
9 Zellmer, he too did not report the incident to law enforcement, nor did he report it, or his  
10 use of County equipment, to his supervisor. Eventually the incident and Mr. Zellmer's  
11 actions came to light<sup>1</sup> and resulted in disciplinary action being taken by the County.  
12 Ultimately, Mr. Zellmer was terminated on April 28, 2016.  
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15 When the County began its disciplinary process MPEA Field Representative Raymond  
16 Berg became actively involved in the situation. As part of his involvement, Mr. Berg  
17 provided Mr. Zellmer with a copy of the MPEA Membership Representation Policy  
18 brochure. This was on April 14, 2016. The brochure explains the representation  
19 process involved in grievance processing up to and including final and binding  
20 arbitration. The brochure further explains the role of the MPEA Executive Director in  
21 determining to what level grievances will be processed and the appeal process should  
22 the Executive Director determine a grievance will not be taken to arbitration.  
23  
24

25 As the matter progressed, Mr. Berg also appeared with Mr. Zellmer at a pre-  
26 determination hearing conducted by Eric Griffin, the County Public Works Director, on  
27 April 27, 2016. It was subsequent to this meeting that Mr. Griffin issued a termination  
28 letter of April 28, 2016. On the heels of this letter Mr. Berg initiated the grievance  
29 procedure up to and including the point where the Board of County Commissioners  
30 unanimously sustained Mr. Griffin's termination decision and denied Mr. Zellmer a Level  
31 III grievance hearing. This left arbitration as the final step in the process. It was at this  
32 point that MPEA Executive Director Quinton Nyman, in a letter dated August 12, 2016,  
33 advised Mr. Zellmer that the Association would not take his discharge to arbitration. Mr.  
34 Nyman further advised Mr. Zellmer that the denial could be appealed to the MPEA  
35 Board of Directors.<sup>2</sup> Mr. Zellmer appealed the decision of Mr. Nyman and the Appeals  
36 Committee of the Board of Directors heard the appeal on August 22, 2016.  
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39 The August 22, 2016 meeting of the Appeals Committee was attended by Mr. Zellmer,  
40 Mr. Nyman and eight members of the Committee, constituting a quorum of the  
41 Executive Board. Of these eight members, four attended by phone and four were in  
42 person. They heard Mr. Zellmer present his case in an allotted 20 minute time period.  
43 They reviewed all the material he presented as well as other relevant material, including  
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46

47 <sup>1</sup> This was several days later. Subsequently charges were filed against Mr. Zellmer and Ms. Ironi for  
48 failing to report the accident.

49 <sup>2</sup> This process is explained in the representation pamphlet as is the potential for a grievant to retain  
50 private counsel, and with the consent of the Association, the ability to pursue the grievance independent  
of the Association.

1 the collective bargaining agreement and its' just cause provision.<sup>3</sup> At the conclusion of  
2 the hearing the committee met and issued its written decision on August 23, 2016. The  
3 Committee decision sustained Mr. Nyman's decision to not proceed to arbitration.  
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5 The above recitation does not include all the arguments of Mr. Zellmer. It does put forth  
6 most of the sequence of events leading to this charge. In that context, the job of the  
7 investigator is not to determine the merit, or lack of merit, of a grievance. The role of  
8 the investigator and the Board of Personnel Appeals is to determine whether or not the  
9 Association breached its duty to fairly represent Mr. Zellmer. In that vein, failing to  
10 process a grievance, or failure on the part of a union to take a grievance to final and  
11 binding arbitration, can be a breach of the duty of fair representation. Although not  
12 specifically stated, that is the basis of Mr. Zellmer's complaint.  
13  
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15 As the U.S. Supreme Court has held, the duty of fair representation does not require  
16 that all grievances be taken to arbitration.  
17

18 "Though we accept the proposition that a union may not arbitrarily ignore a  
19 meritorious grievance or process it in a perfunctory fashion we do not agree that  
20 the individual employee has an absolute right to have his grievance taken to  
21 arbitration regardless of the provisions of the applicable collective bargaining  
22 contract." Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967)  
23  
24

25 Moreover, the duty of fair representation does not limit the legitimate right of the union  
26 to exercise broad discretion in performing its duties because "union discretion is  
27 essential to the proper functioning of the collective bargaining system." International  
28 Brotherhood of Electrical Workers v. Foust, 442 U.S. 42 (1979).  
29

30 A union violates its duty of fair representation to the employees it represents only if its  
31 actions are "arbitrary, discriminatory or in bad faith . . ." Vaca v. Sipes, supra. To  
32 determine if the duty to fairly represent has been breached each element in the three  
33 part standard must be examined, Airline Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 77  
34 [136 LRRM 2721] (1991). The Board of Personnel Appeals has adopted the Vaca  
35 standard and in Ford v. University of Montana and Missoula Typographical Union No.  
36 277, 183 MT 112, 598 P.2d 604, (Mont 1979) the Montana Supreme Court in reviewing  
37 an unfair labor practice charge brought before the Board held:  
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40 In short, the Court has to find that the Union's action was in some way a product  
41 of bad faith, discrimination, or arbitrariness. The mere fact that Bonnie Ford  
42 disagrees with the decision of the Union [in determining that her grievance was  
43 without merit] is not sufficient basis for a finding of breach of the duty of fair  
44 representation absent these factors.  
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47 <sup>3</sup> The discharge provision of the contract provides, "The EMPLOYER may discharge any regular,  
48 seasonal, or temporary employee for JUST CAUSE. At least one (1) warning letter shall be given any  
49 employee subject to dismissal EXCEPT in cases of insubordination, gross dereliction of duty, abuse of  
50 drugs, intoxication and unexcused absences of two (2) days." Mr. Zellmer contends that under this  
definition none of what he did, or did not do, meets the exception language.

1  
2 Mr. Zellmer has not contended that the Association acted in bad faith or that it  
3 discriminated against him in some fashion. Rather, his argument is that the Association  
4 ignored valid arguments on his behalf and/or did not consider things that could have  
5 been brought to the attention of the County. Essentially, his argument is that the  
6 actions, or non-actions of the Association ignored substantive points. His argument  
7 then is that this failure to present certain arguments resulted in his termination. Two  
8 points are of particular merit to Mr. Zellmer. One is the language of the contract  
9 concerning discharge for just cause. The other, and it is not the only argument but is  
10 the most significant one, is that County equipment was, in fact, used by County  
11 employees for personal use.  
12

13  
14 Of Mr. Zellmer's arguments, it is correct that the just cause language does require a  
15 written warning. However, the exceptions that could be applied to his situation are  
16 rather broad in interpretation. Arguably, Mr. Zellmer's actions could meet two of the  
17 exceptions, and if so, no written warning would be required prior to termination. On his  
18 second point, although County policy defines only certain prohibited activities limiting  
19 the use of County equipment, common sense says they are not all inclusive. Moreover,  
20 in the course of discussing his use of County equipment for other personal purposes  
21 with the investigator, for instance plowing on his own property, it is apparent to the  
22 investigator that the County did have an idea such use was occurring and thus it was  
23 allowed. The same is not true of the accident where the County had neither prior, or  
24 post, contemporaneous knowledge of use of its equipment to remove the vehicle. With  
25 these two points in mind, there is a sound basis for the Association to question whether  
26 or not it would prevail in an arbitration. Considered in its totality the case could be a  
27 winner just as much as it could be a loser.  
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30  
31 Given the absence of bad faith or discrimination by the Association, the remaining issue  
32 is whether the grievance was handled in a perfunctory manner, or in an arbitrary  
33 fashion. Beyond that, was the decision to not arbitrate the case done in an arbitrary  
34 fashion? There is no question the Association diligently met the steps necessary to  
35 process the grievance. Although Mr. Zellmer might question some tactics, the facts  
36 show that the Association met timelines and moved his case forward with due diligence.  
37 Then, at the point where arbitration was denied, the MPEA followed its process to  
38 determine whether it would take the case to arbitration. Nothing indicates Mr. Zellmer  
39 did not receive an adequate opportunity to present his case to the Appeal Committee  
40 and nothing indicates that either the Executive Director, or the Committee acted in an  
41 arbitrary manner. <sup>4</sup>  
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46 <sup>4</sup> The Association received a 25 day extension from the County in order to decide if arbitration was in  
47 order. One troubling aspect of this to the investigator is that the Committee met on the 24<sup>th</sup> day and  
48 issued its decision by mail on the 25<sup>th</sup> day. Essentially there was no time for Mr. Zellmer to try to get  
49 authority to arbitrate the matter on his own. That said though, the representation pamphlet provides  
50 adequate notice of his rights and it may well have behooved Mr. Zellmer to have considered retaining  
counsel when the Executive Director denied arbitration.

1 Upon thorough review of this matter the investigator fails to find substantial evidence for  
2 a finding of probable merit.

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5 **III. Recommended Order**

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7 It is hereby recommended that Unfair Labor Practice Charge 2-1017 be dismissed as  
8 without merit.  
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11  
12 DATED this 17th day of October 2016.  
13  
14

15 BOARD OF PERSONNEL APPEALS

16  
17  
18 By:   
19

20 John Andrew  
21 Investigator  
22

23  
24 NOTICE

25  
26 Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of  
27 the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss  
28 may be appealed to the Board. The appeal must be in writing and must be made within  
29 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the  
30 Board at P.O. Box 201503, Helena, MT 59620-1503. If an appeal is not filed the  
31 decision to dismiss becomes a final order of the Board.  
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34 CERTIFICATE OF MAILING

35  
36 I, Windy Knutson, do hereby certify that a true and correct copy  
37 of this document was mailed to the following on the 17<sup>th</sup> day of October  
38 2016, postage paid and addressed as follows:  
39  
40

41 TOD ZELLMER  
42 PO BOX 1172  
43 LINCOLN MT 59639  
44

45 JAMES P MOLLOY  
46 ATTORNEY AT LAW  
47 PO BOX 70  
48 BOZEMAN MT 59771 0070  
49  
50

